In the result, there will be order in terms of prayers 1 and 2 of the summons. The damage or loss, if any, is to be assessed by the registrar. The defendants to pay costs.

Plaintiffs' application allowed.

Solicitors: *Bernard Rada & Lee; KL Tan & Associates.*

Reported by *Teoh Ai Lin*

Wardley Ltd v Tunku Adnan & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1779 OF 1989
SELVAM JC
11 APRIL 1991

Banking — Multi-currency loan agreement — Guarantee under multi-currency loan — Currency of payment under the loan — Whether guarantors required to pay on guarantee in Swiss francs or Australian dollars — Whether guarantors required to pay interest at the rate contracted in the loan agreement or at the statutory rate stipulated by O 42 r 12 of the Rules of the Supreme Court 1970

Civil Procedure — Interest after judgment — Whether plaintiffs entitled to such interest at contractual rate (higher than statutory rate) — Function of court to construe the interest provision — Whether ancillary or independent term — Nature of proceedings to be ascertained — Whether against the security or the debtor

Contract — Guarantee and indemnity — Construction of — Liability of guarantors (defendants) to repay the loan in the same manner as the borrowers — Determining the 'money of payment'

Words and Phrases — 'As well after as before judgment'

The defendants were guarantors of a loan made by the plaintiffs to four Malaysian borrowers. The loan was for an equivalent amount in Eurocurrency of A$1.160m which the borrowers required for the purchase of properties in Australia. In the event of default, interest was payable at 4½% pa above deposit rate ('the contractual interest'). The loan was eventually made in Swiss francs. The plaintiffs applied for and obtained judgment for the outstanding principal sum and contractual interest against the borrowers. The present action was brought by the plaintiffs against the defendants on the ground that contractual interest was payable after judgment and that the loan was to be repaid in Swiss francs and not Australian dollars.

Held, dismissing the defendants' appeal and allowing the plantiffs' cross-appeal:

(1) Parties to a transaction may always make their own arrangements regarding money of account and money of payment. The loan agreement clearly provided that the money of account and money of payment was the Swiss franc. Consequently the guarantors are liable to pay in Swiss francs.

(2) The function of a court presented with a claim for a contractual rate of interest higher than the statutory rate is to construe the interest provision and characterize it as an ancillary or independent term. In the instant case, the interest provision was expressed as an independent term which would survive any judgment for the principal debt. The plaintiffs were, therefore, entitled to judgment for interest at the contractual rate until payment.

Per curiam: The *Sim Lim* case[1] was decided on an incorrect reading of the *Economic Life Assurance* case.[5] The registrar's decision in that case had in effect introduced words into O 42 r 12 of the Rules of the Supreme Court 1970 without justification.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 64 of 1991.]

Cases referred to

1 *Sim Lim Finance Ltd* v *Pelandok Enterprises Pte Ltd* [1981] 1 MLJ 280 (not folld)
2 *Woodhouse AC Israel Cocoa Ltd SA & Anor* v *Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 (CA); [1972] AC 741 (HL) (refd)
3 *Miliangos* v *George Frank (Textiles) Ltd* [1976] AC 443 (folld)
4 *Ex p Fewings* (1883) 25 Ch D 338 (folld)
5 *Economic Life Assurance Society* v *Usborne & Ors* [1902] AC 147 (folld)
6 *Re European Central Railway Co, ex p Oriental Financial Corp* (1876) 4 Ch D 33 (refd)
7 *MBF Finance Bhd* v *Malaysia Air Charter Co Sdn Bhd & Ors* [1987] 2 MLJ 718 (refd)
8 *Re Agriculturist Cattle Insurance Co, ex p Hughes* (1872) 4 Ch D 34 (refd)
9 *Popple* v *Sylvester* (1882) 22 Ch D 98 (refd)
10 *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (refd)
11 *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 42 r 12
Judgments Act 1838 [UK] s 17

Steven Ang for the plaintiffs.
R Chandra for the defendants.

Cur Adv Vult

Selvam JC: There are two appeals before me as the judge-in-chambers ('this court'). They arose out of an action commenced by a merchant bank, Wardley Ltd ('the bank'). The defendants were guarantors of a loan made by the bank ('the guarantors'). The loan was made to four Malaysian borrowers ('the borrowers').

By an agreement dated 30 July 1984 and entered into between the bank and the borrowers, the bank agreed to grant a loan for an equivalent amount in Eurocurrency of A$1.160m ('the loan agreement'). The loan agreement defined Eurocurrency as 'Swiss francs, United States dollars or any other currency, deposit of which was for the time being generally available to the bank in the Singapore Inter-Bank Market'. The borrowers required the loan for the purchase of properties in Australia which was to be paid for in Australian dollars.

The loan agreement further provided that the drawing of the loan would be made 'in the relevant Eurocur-

rency as determined to purchase A$1.160m on the date of the drawing'.

Under the provisions of the loan agreement, repayment was to be made 'in the currency of the loan'. The repayment clause in the loan agreement provided for the loan to be repaid in four instalments. The first three instalments were of A$50,000 each 'in the currency in which the loan is denominated'. The last instalment was for 'the whole of the loan then outstanding'.

In case of default, interest was payable 'from the time of default up to the time of actual payment (as well after as before judgment), at the rate per annum ... 4½% above deposit rate' ('the contractual interest'). The loan was eventually made in Swiss francs.

In 1989, the bank commenced an action against the borrowers (Suit No 1730 of 1989) and obtained summary judgment for the outstanding principal sum in Swiss francs under O 14 of the Rules of the Supreme Court 1970 ('the Rules'). The bank also applied for judgment for the contractual interest to continue even after judgment. The registrar who heard the application denied the interest claimed on the ground that interest after judgment was governed by O 42 r 12 of the Rules. He was coerced into that decision by *Sim Lim Finance Ltd* v *Pelandok Enterprises Pte Ltd.*[1] The contractual interest was much higher than the 8% pa rate prescribed by the Rules. The bank and the borrower appealed against the registrar's decision to the judge-in-chambers. Karthigesu J affirmed the judgment for the principal amount in Swiss francs and reversed the decision of the registrar on interest and allowed the contractual interest rate to continue after judgment. The borrowers have appealed against the decision of Karthigesu J to the Court of Appeal.

The bank also brought an action against the guarantors and applied for summary judgment. The registrar decided the way he did in the action against the borrowers. Both the guarantors and the bank appealed. These are the appeals before this court.

The appeals

The appeal against the judgment for the principal amount was founded on the argument that the liability of the borrowers must be measured in Australian dollars. It was argued that the bank had received in Australian dollars, by way of repayment or realization of securities, more than the amount of the loan in Australian dollars. After the loan was made, the Australian dollar had depreciated against the Swiss franc.

The appeal by the bank was on the ground that the contractual interest was payable even after judgment. The interest provision in the loan agreement stood apart from the provision for repayment of the loan and was not an ancillary term. In the result, the judgment for the principal amount had no bearing on the claim for the contractual interest.

The decision

It is the opinion of this court that the undertaking of the guarantors was clearly expressed as an 'all money guarantee'. Consequently the short answer to the guarantors' appeal is that, as a matter of construction of the guarantee, the debt of the borrowers was payable by the guarantors in the same manner as it was by the borrowers. In this case, the amount of principal sum and interest found due was in Swiss francs. The guarantors, accordingly, are liable to pay in the same Swiss francs.

The decision against the borrowers technically is not binding on the guarantors as they were not parties to the action in which the decision was given. This court, therefore, will discuss the arguments articulated before it.

The currency point

As a general rule, a debt payable at a future time involves an obligation to pay the nominal amount of the debt and in the same unit of money in the form of the permitted legal tender at the time of repayment — see *Chitty on Contracts, General Principles* (26th Ed) para 1542. In legal parlance, this is known as the nominalistic principle of monetary obligation. According to this principle, the creditor is entitled to measure the debt in and demand repayment in the same units of money lent. The units in which the debt is measured is usually referred to as the 'money of account'. If repayment is not legally possible in the money of account, the debtor must pay in a permitted currency applying the rate of exchange at the time of payment. The units of money used to discharge the debt is called 'the money of payment'. Thus where a debt is expressed in Swiss francs both creditor and the debtor may insist that it be discharged by the same nominal amount of Swiss francs at the time of payment. The principle of nominalism will ignore any fluctuations in the value of the money of account. Accordingly where the money of account and money of payment are different, the debtor will benefit by the depreciation of the money of account and suffer by its appreciation. See generally FA Mann *The Legal Aspect of Money* (4th Ed) at pp 191-207 and *Woodhouse AC Israel Cocoa Ltd SA & Anor* v *Nigerian Produce Marketing Co Ltd.*[2]

The effect of *Miliangos* v *George Frank (Textiles) Ltd*[3] and other decisions spawned by it is the recognition and enforcement of the principle of nominalism. Before that case, when it came to giving judgment, English law moved in a different direction by reason of a procedural rule. According to this rule, a monetary judgment must be expressed in the domestic units of

money. The rate of exchange to convert foreign money to give judgment in domestic money was taken at the date of breach and not payment. Foreign money, according to English law, was not money but commodity. The rule was wholly unrealistic in modern days when wild fluctuations in exchange rates became a daily or hourly event. After the *Miliangos* case[3] it became possible to give judgment in a foreign currency and enforce it by applying the rate of exchange at the date of payment or execution.

Parties to a transaction may always vary the nominalistic principle and make their own arrangements regarding money of account and money of payment. So they did in this case. The loan agreement clearly provided that the money of account and money of payment was the Swiss franc. The loan agreement contained a slight variation as regards the three instalments of A$50,000 each. But the money of account remained Swiss francs throughout. The real aim of the agreement was adherence to the principle of nominalism. In such a case it is the duty of the court to enforce the terms of the agreement. This is what the registrar did in this case. The conclusion of this court is that he was right in recognizing Swiss franc as the money of account and giving judgment in Swiss francs. That was the commercial basis on which the parties had contracted.

Interest after judgment

Now the question of interest after judgment. This entails a consideration of the interaction of contractual interest provisions with O 42 r 12 of the Rules. The rule reads as follows:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such rate as the Chief Justice may from time to time direct or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until judgment is satisfied.

To understand the meaning and effect of the rule we must begin with s 17 of the Judgments Act 1838 [UK] and the relevant cases on that section. Section 17 of the Judgments Act 1838 [UK] provided as follows:

> Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment ... until the same shall be satisfied ...

The interest rate remained at 4% until 1971 when it was varied under the power conferred by s 44(1) of the Administration of Justice Act 1970. In 1985, it was increased to 15% pa.

The following propositions of the law can be distilled from the judgments of Fry LJ in *Ex p Fewings*[4] and Lord Davey in *Economic Life Assurance Society* v *Usborne & Ors*.[5]

(1) Where a contract provides for the repayment of 'principal sum with interest', the right to interest will merge in the judgment together with the claim for the principal sum.

(2) Where a contract or a subsequent agreement expresses the right to repayment of principal and interest as independent rights, there will be no merger of the interest claim into the judgment for the principal sum.

(3) Where a security document entitles the creditor to retain his security until he is paid the full amount of his principal and interest, the right to full interest will not be affected by any merger of the interest covenant into a judgment against the debtor. In other words, full interest is recoverable in an action to realize the security (foreclosure) or the freeing of security (redemption).

The first proposition is illustrated by *Re European Central Railway Co, ex p Oriental Financil Corp*;[6] *Ex p Fewings*[4] and *MBF Finance Bhd* v *Malaysia Air Charter Co Sdn Bhd & Ors*.[7] In these cases, as a matter of construction there was a single inseparable agreement to pay principal and interest; the interest covenant being merely ancillary to the principal covenant.

The second proposition is exemplified by *Re Agriculturist Cattle Insurance Co, ex p Hughes*,[8] *Popple* v *Sylvester*[9] and *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors*.[10] The first case was an extreme example. There were two separate agreements regarding interest bearing different dates. The proposition stated cannot be readily discerned by a reading of the report of *Popple* v *Sylvester*.[9] Lord Davey in *Economic Life Assurance Society* v *Usborne & Ors*[5] explained the principle of *Popple* v *Sylvester*[9] as stated above. The form of interest covenant in *Popple* v *Sylvester*,[9] which was 'so long as the principal sum should remain due on the security of the indenture' according to Lord Davey, was an independent covenant. It, therefore, did not 'merge in or [was] extinguished by the judgment obtained upon the principal covenant'.

Instances where the third proposition was applied are *Economic Life Assurance Society* v *Usborne & Ors*[5] and *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd*.[11] Both cases were actions in respect of security and not personal actions against the debtors. Accordingly, the first and second propositions were irrelevant.

The function of a court presented with a claim for a contractual rate of interest higher than the statutory rate is, therefore, to construe the interest provision and characterize it as an ancillary or independent term. The nature of the proceedings should also be ascertained — whether in substance they are against the security or the debtor.

If the agreement contains an indivisible undertaking in the sense that the interest term, as a matter of

construction, is merely an ancillary provision, there must be one judgment for the principal sum and for interest to continue after the judgment at the contractual rate.

In any case if the proceedings are against the security, the full contractual interest may be recovered from the security.

Where the parties have contracted for a higher contractual interest to survive the judgment, the judgment creditor cannot have the benefit of both the contractual and the statutory interest. Having contracted out of the statutory provision, the judgment creditor may recover only the contractual interest.

In this case the bank brought a personal action against the debtor. In the opinion of this court, the interest provision was expressed as an independent term which would survive any judgment for the principal debt. It read: 'as well after as before judgment'. This phraseology is treated as a term of art to express an interest provision as an independent covenant in several standard texts. See *Fisher and Fleetwood's Law of Mortgage* (9th Ed) p 597 n (e) and p 680. In *The Encyclopaedia of Forms and Precedents* (4th Ed) p 40 n 80 it is stated:

> In order to avoid the possibility of reduction in the rate of interest it is common practice in mortgages to provide that interest shall be payable at the specified rate as well after as before any judgment.

In 15 *Encyclopaedia of Forms and Precedents* (4th Ed) p 84, it is stated that 'in the absence of such a provision the interest covenant will merge in the judgment and the lender will only be entitled to the interest allowable on his judgment'.

Financial institutions and legal draftsmen have acted on the expression all over the world. Courts should not arbitrarily reject it. It will be harmful to the banking community whose cost of funds may be higher than the statutory interest.

The Sim Lim case[1]

Sim Lim Finance Ltd[1] must now be discussed. The relevant clause provided for interest at the specified rate to apply 'as well after as before any judgment'. The registrar rejected the claim for the contractual interest. He was not persuaded by the *Economic Life Assurance* case[5] because 'it did not involve determination of provisions similar to ... O 42 r 12 of the Rules'. He, however, concluded that the *Economic Life Assurance* case[5] 'was factually on point, in that there was a clause ... that stipulated that the agreed rate was to apply even after judgment'.

There was an appeal to the judge-in-chambers. The appeal judge said that the *Economic Life Assurance* case[5] was decided on the basis that the claimant was entitled to retain the security with the higher interest and, therefore, was different from the case before him. This observation by the learned appeal judge was correct. This court, however, for reasons stated below and with respect, must differ on his decision.

A careful reading of the *Economic Life Assurance* case[5] will reveal that in that case there was no finding of a stipulation to pay the contractual interest 'even after judgment' as concluded by the registrar. That case, therefore, was not factually on point. Moreover, that case and the cases discussed in it were decided in the backdrop of a statutory provision similar to O 42 r 12, namely, s 17 of the Judgments Act 1838 [UK]. In substance, they both were the same. It was, therefore, not quite correct to say that the case 'did not involve determination of provisions similar to O 42 r 12 of the Rules'. The *Economic Life Assurance* case[5] on facts was different from *Sim Lim Finance*[1] in that the former was an action in respect of security which the creditor was entitled to retain until the full amount of principal and interest was paid. The *Sim Lim* case[1] should have deduced and applied the second proposition stated above.

The registrar concluded that as the words 'unless it has been otherwise agreed between the parties' (which were part of the rule relating to interest on judgment debt in the Rules of the Supreme Court 1934) were not part of the present rule, any agreement between the parties for a different interest rate should be ignored. The meaning and effect of s 17 of the English Act and the rule was to confer the benefit of interest on judgment where there was none. Alteration of contractual arrangements made by the parties could not have been their aim. If the rule intended the conclusion made by the registrar, express words like 'notwithstanding that it has been otherwise agreed between parties' ought to have been introduced. The rule did not contain such an expression. The registrar's decision in effect introduced such words into the rule without justification.

For reasons stated earlier, the interest provision in this loan agreement was drafted so as to stand as an independent covenant and was intended to continue after judgment on the principal debt. It was pleaded as such. There was a separate prayer for it. The bank, accordingly, was entitled to judgment for interest until payment.

In the result, the learned senior assistant registrar's decision must be set aside and substituted in its stead an order to pay interest at the contractual rate until payment.

Defendants' appeal dismissed; plaintiffs' cross-appeal allowed.

Solicitors: *Godwin & Co; Haridass Ho & Partners.*

Reported by *Liu Hern Kuan*